

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Guardsmark, LLC,

Petitioner-Employer,

and

**International Union, Security, Police, and Fire
Professionals of America (SPFPA),**

Labor Organization.

Case 5-RC-143199

**GUARDSMARK’S EXCEPTIONS TO HEARING OFFICER’S
REPORT AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION**

For the reasons stated below, Guardsmark, LLC (“Guardsmark”) takes exception to the Hearing Officer’s Report and Recommendations on Objections to Election, dated May 7, 2015. Guardsmark also incorporates herein by reference its Request for Review of March 19, 2015 Report on Objections by Region 5 (filed April 2, 2015). For all of the reasons stated in both filings, Guardsmark requests that the Board set aside the mail ballot election and order a manual election.

Summary

At the heart of this controversy is a mail ballot representation election amongst the security officers employed by Guardsmark at Providence Hospital in Washington, D.C. that took place over two weeks between January 28, 2015 and February 11, 2015 (the “Election”). There were thirty-three eligible voters. Eleven voted in favor of the Union and two voted against. But at least ten employees—a dispositive number—were denied the opportunity to vote in the Election! Guardsmark has objected from the beginning that the Election was fraught with several errors that cumulatively resulted in at least 30% of all voters being disenfranchised. First the

Region, then the Hearing Officer, ignored the overall impact of the errors when taken together. Rather, both improperly considered individual errors in isolation to overrule Guardsmark's objections one-by-one.

The six individual errors identified by Guardsmark that cumulatively resulted in the disenfranchisement of at least 30% of the eligible voters were that:

1. The Regional Director improperly insisted upon a mail ballot over the request of Guardsmark for a manual ballot;¹
2. The Regional Director improperly refused Guardsmark's request to hold a mass meeting with the employees in the hours prior to the ballots being mailed (thus limiting notice to employees about the Election);
3. About a quarter, eight out of thirty-three, eligible voters did not receive ballots timely;²
4. Two out of the fifteen voters who did submit ballots failed to sign the identification stub and the Region did not provide them new ballots;³
5. Ten out of thirty-three (30%) eligible voters were disenfranchised; and
6. The notice of election did not adequately apprise the eligible voters how to obtain duplicate ballots, thus exacerbating the prior errors.

But the Hearing Officer only considered (at the direction of the Regional Director) the third individual objection in isolation. As a result, the Hearing Officer improperly refused to allow evidence and/or ignored evidence regarding the faulty mail ballot election, the improper time

¹ The entire mail ballot process here was flawed. One of the employees who did not receive a ballot and did call the Region for a duplicate copy around the date identified by the Region, did not have enough time to return the ballot to be counted. Despite following all of the Region's rules, that employee's ballot arrived eight days after the tally!

² Guardsmark's initial investigation revealed that 13 out of 33 voters had been disenfranchised—about 40%. However, Guardsmark was not able to serve subpoenas on all of the disenfranchised voters. As a result, the evidence presented at the hearing was that 10 out of 33 voters—30%—had been disenfranchised.

³ The Region did properly sustain Guardsmark's objection regarding this error, but improperly refused to remedy it, wrongly claiming, that two disenfranchised voters would not change the outcome of the Election.

permitted for the mail ballot election, and most importantly, Guardsmark's objections to the alleged notice of the Election that exacerbated the problems when mail ballots were not received by voters.

Remarkably, the Hearing Officer's Report and Recommendations to overrule Guardsmark's objections are almost solely premised on the adequacy of the Region's notice in this mail ballot Election. At the same time, the Hearing Officer refused to consider Guardsmark's evidence regarding the inadequacy of the notice itself. In effect, the Hearing Officer found that the Region's failure to serve mail ballots on 30% of eligible voters could be ignored because a telephone number to request a ballot was obscurely placed in a posted notice. It did not matter to the Hearing Officer that even when an employee called the telephone number and followed the Region's procedure, the ballot was not be mailed out in time to be counted through no fault of the employee. Speed and limiting costs (the reasons proffered by the Region for a mail ballot) were given priority over the rights of the employees to vote in this Election and at the hearing.

The Board has consistently held that "the primary consideration in the conduct of any election is whether the *employees* are afforded adequate notice and sufficient opportunity to vote." *Cities Service Oil Co. of Pennsylvania*, 87 NLRB 324, 328 (1949) (emphasis in original). Yet, the overall effect of the election procedure employed here has resulted in inadequate notice to eligible voters and an insufficient opportunity to vote. The Region ought to have set the Election aside and Guardsmark now requests that the Board do so.

Lemco Standard

Both the Regional Director in his Report on Guardsmark's Objections and the Hearing Officer in her Report and Recommendations cite *Lemco Construction, Inc.*, 283 NLRB 459 (1987) for the following proposition:

In *Lemco Construction, Inc.*, 283 NLRB 459 (1987), the Board determined that election results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The Board declared it will not apply a percentage test of eligible voters voting to determine the validity of an election, rather, it will find an election to be valid if: (1) all employees have received adequate notice of the election; (2) all employees were given adequate opportunity to vote; and (3) employees were not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics of the election. See also *Northern Star Realty Co.*, 283 NLRB 1159 (1987); *Community Care System*, 284 NLRB 1147 (1987).

Ex. 1, Report and Recommendations, pp. 7–8. The Hearing Officer was limited in what she could consider under the *Lemco* standard, however, because the Regional Director had already determined that the first prongs were met because the Region’s Notice had been posted and allegedly because “the mail ballot process **impliedly** affords employees the adequate opportunity to vote.” Ex. 2, Regional Director Report, p. 8 (emphasis supplied). However, Guardsmark’s objections have always been that: (1) the Notice of Election was inadequate for several reasons; (2) all employees were not given an adequate opportunity to vote; and (3) employees were prevented from voting by unfairness in the scheduling or mechanics of the Election.

Many Employees Were Denied Opportunity to Vote

While the Hearing Officer was prevented from considering all of the reasons Guardsmark felt the Election was fatally flawed, her findings support Guardsmark’s position. First, the Hearing Officer’s Report and Recommendations find that at least six employees did not timely receive a ballot and that Guardsmark had made an offer of proof that the two other employees who had been subpoenaed to testify would concur that they had not received a ballot. See Ex. 1, pp. 5–7. It is undisputed that those eight ballots (coupled with the two voters to which the Region did not send duplicate kits) could be dispositive in this Election where the vote was eleven to two. These employees were not given an adequate opportunity to vote because they were not provided ballots.

The Regional Director and the Hearing Officer alleged that these employees were given an opportunity to vote because they could have called the telephone number on the Notice to receive a duplicate ballot, but did not. However, one employee—Chimere Bryant—did call for a duplicate ballot. Ex. 1, p. 5. It did not arrive in time for her to cast her vote. *Id.* The Hearing Officer found that Ms. Bryant had followed the Region’s directions exactly as written, but she was still prohibited from voting due to the mail balloting process established by the Region. There is no reason to believe the rest of the employees would have been able to get ballots in enough time to vote had they known to call for a duplicate ballot.

**Many Employees Were Prevented From Voting By
Unfairness in the Scheduling and/or Mechanics of The Election**

The attorney from the General Counsel’s Office (off the record) stated at the hearing that the Region knows mail going through Washington, D.C. takes longer than everywhere else in the country because of the need to check for things like anthrax (as occurred several years ago). As found by the Hearing Officer, it took about a week for Ms. Bryant to receive her duplicate ballot and then another nine days for it to get back to the Region’s office, for a total of fifteen days.⁴ Ex. 1, p. 5. Yet, the Region only provided fourteen days total for this mail ballot Election. Guardsmark objected to a mail ballot process for this Election (as discussed in Guardsmark’s Request for Review of the Regional Director’s Report). This mail ballot process was fatally flawed.⁵

⁴ Ms. Bryant called the Region around February 4 to obtain a duplicate ballot and received it on February 10. She mailed the ballot that same day, but it was not received by the Region until February 19—8 days after the tally of ballots. *See* Ex. 1, p. 5.

⁵ The Region ought to have given more than two weeks for a proper mail ballot election since it was aware of the mail delay in D.C., where all of the eligible voters work.

The Hearing Officer asserts that Guardsmark “claims that the Region failed to mail ballots to 11 of 33 employees”, but that “no specific evidence was introduced showing any irregularity with the mechanics of the election.” *See* Ex. 1, pp. 4, 9. That is not what Guardsmark claims. Rather, Guardsmark does not know why such a large percentage of employees did not receive ballots. Guardsmark attempted to have the Region produce the documents evidencing how it prepared the mail ballots, which addresses were actually typed on the envelopes sent to employees, when the ballots were mailed, etc., but the General Counsel and the Regional Director refused to produce any documentation that would show whether the mail balloting had been carried out properly. *See* Ex. 3, Regional Director Response to Request for Subpoenas; Ex. 4, General Counsel Response to Request for Subpoenas. Guardsmark objected at the Hearing and continues to object to the Region’s refusal to produce the documents that would establish how the mail balloting was actually conducted. That information should have been produced. *See NLRB v. Pinkerton’s, Inc.*, 621 F.2d 1322 (6th Cir. 1980) (remanding for evidentiary hearing as to whether four mail ballots were actually mailed where Board provided no evidence to establish how it conducted mail ballot election). What Guardsmark does know (and is not disputed) is that a large percentage of employees were not provided ballots to begin with. As a result, these employees did not vote in the Election and were disenfranchised.

The Regional Director and Hearing Officer claim that these disenfranchised voters had an opportunity to call the Region to obtain duplicate ballots when the original ballots did not arrive. However, placing the onus on a large percentage of voters to seek out their own ballots rather than being provided the ballots directly means that the voters—not the Region—were responsible for carrying out the Election. The NLRA requires that the NLRB carry out elections; not voters. 29 U.S.C. § 159. The cases cited by the Hearing Officer do not change this analysis

because none of those cases involved a large percentage of the eligible employees not receiving ballots. *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089 (D.C. Cir. 2002) (less than 3% of the eligible voters did not receive mail ballots); *Sitka Sound Seafoods, Inc.*, 325 NLRB 685 (1998) (about 4% of eligible voters ballots returned undeliverable and duplicates were automatically provided). Here, between a quarter to a third of the eligible voters were not provided ballots through no fault of their own.

In *Star Baking Co.*, 119 NLRB 835 (1957), the Board set aside an election where one employee did not receive mail ballot. The Board held:

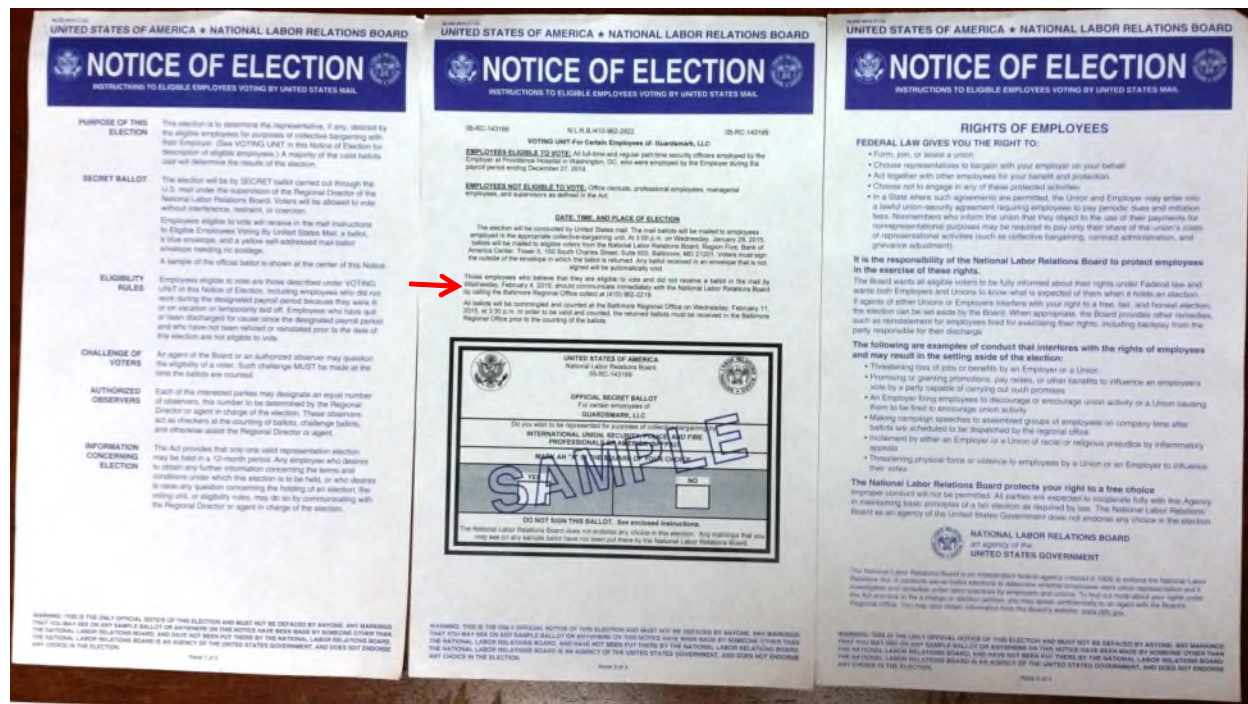
[I]t is the responsibility of the Board to establish the proper procedure for the conduct of its elections, **which procedure requires that *all eligible voters*, not merely a representative number, be given the opportunity to vote.** It is particularly important to remedy the failure to discharge this responsibility where, as here, the vote of the employee who failed to receive a ballot could have affected the results of the election. [Emphasis supplied.]

It is undisputed that all eligible voters were not given the opportunity to vote in this Election. A dispositive number of employees here were prevented from voting for some reason outside of their control. This situation is just like the cases involving inclement weather that prevented employees from getting to the polls to vote. In *Baker Victory Services*, 331 NLRB 1068 (2000), severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote, so a new election was ordered. In *V.I.P. Limousine, Inc.*, 274 NLRB 641 (1985), an election set aside (despite 75% of eligible voters voting) because a snowstorm prevented some employees from voting. The Board should set aside the Election and order a re-run.

Notice of the Election Was Inadequate

Finally, the Notice itself was inadequate to aid the employees in the voting process. The Hearing Officer admitted that the directions to obtain a duplicate ballot were buried in the middle

of three legal sized pages of text, with boilerplate language on either side. Ex. 1, pp. 4–5, 7 n.7. But that description does not even do justice to what was expected of these employees who never received ballots. The Notice was posted in the only place available—the guard office at Providence Hospital. *Id.* at p. 4. The security officers were not in the office for long, but have posts outside the office. The information related to obtaining a duplicate ballot in the tight time-frame set by the Region was literally 2.5 lines of plain text buried in the middle of three legal-sized pages of legalese (near the red arrow below). *See* Ex. 5, Notice of Election. There was no heading identifying what to do if your ballot does not arrive. The language was not bolded. There was nobody named as the person to call to request a new ballot. It was a phone number hidden between boilerplate language. *Id.*



The actual Notice is shown above (smaller) with the addition of a red arrow pointing to the only place in the three-page long Notice where the Region provided instructions to obtain a duplicate ballot—2.5 non-descript lines amongst 140 lines. The arrow was not present on the employees’

Notice, nor was there anything else directing attention to the procedural safeguards for the voters. In a mail ballot election, where employees were responsible for remembering when the ballots should arrive and responsible for calling a telephone number should ballots not arrive within the short window allotted by the Region, more care should have been taken to with manner of notify employees of their obligations by the Region.

Several of the employees testified that they did not know about the telephone number to call to receive a duplicate ballot, despite seeing the three pages full of legalese on the bulletin board. Ex. 1, pp. 6–7. Two employees did not even realize that the Election had started (and ballots allegedly mailed to them) until the Election was over. Moreover, as provided in Guardsmark’s original objections and discussed in Guardsmark’s Request for Review, there was no individual identified in the Notice for employees to call if they did not receive the ballot. The Notice was inadequate to aid the employees who were not provided ballots.

Further compounding the inadequate notice to the employees was the Region’s decision not to allow Guardsmark to address the employees on the day the ballots were mailed. This issue is discussed in Guardsmark’s initial Request for Review. But it is important to point out here that had Guardsmark been permitted to hold a mass meeting with the employees on the morning that the ballots were being mailed, Guardsmark could have reminded them closer to the date of mailing to watch for the ballots. Instead, employees did not realize when the ballots were to arrive. By the time they realized their ballots were not sent to them, the tally was over and they were disenfranchised.

Conclusion

Considered collectively, all the errors in the conduct of this Election resulted in the disenfranchisement of 30 to 40% of the eligible voters. At least ten voters did not get an

opportunity to vote. Where only eleven people voted in favor of the Union and two voted against the Union, those ten disenfranchised voters are key to the outcome of the Election.

The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.

New York Telephone Co., 109 NLRB 788, 790–791 (1954). Several irregularities in the conduct of this Election resulted in a sufficient number of ballots not being considered. The Hearing Officer and the Region erred in not looking at all of these errors taken together. The mail ballot Election here ought to be set aside and a manual ballot election ought to be ordered.

Respectfully submitted,

BARRIS, SOTT, DENN & DRIKER, PLLC



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Dated: May 21, 2015

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PROOF OF SERVICE

I hereby certify that on May 21, 2015, GUARDSMARK'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION, dated May 21, 2015, were served upon the following persons:

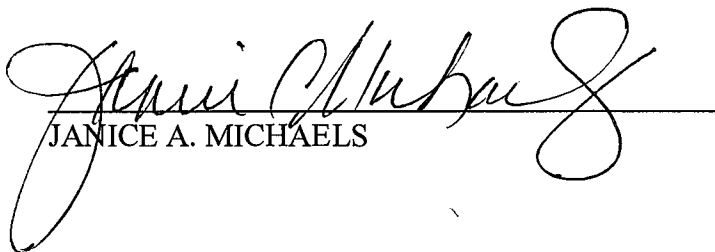
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via e-file. I declare that the statements above are true to the best of my information, knowledge, and belief.


JANICE A. MICHAELS

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EXHIBIT LIST

- Exhibit 1 - Hearing Officer's Report and Recommendations on Objections to Election
- Exhibit 2 - Report on Objections and Notice of Hearing
- Exhibit 3 - Region Response to Request for Board Agent Testimony
- Exhibit 4 - Response to Request for Approval by General Counsel for Board Agent Testimony and Production of Documents
- Exhibit 5 - Notice of Election

EXHIBIT 1

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

GUARDSMARK, LLC

Employer

and

Case 05-RC-143199

**INTERNATIONAL UNION, SECURITY, POLICE,
AND FIRE PROFESSIONALS OF AMERICA
(SPFPA)**

Petitioner

Before: Kathleen O'Neill, Hearing Officer

Appearances:

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**HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON
OBJECTIONS TO ELECTION**

I. STATEMENT OF THE CASE

Pursuant to a Stipulated Election Agreement approved by the Regional Director on December 31, 2014, a representation election was conducted by mail ballot in the unit set forth in paragraph 4 of the Agreement. Under the supervision of Region 5, ballots were mailed on January 28, 2015, and the Tally of Ballots was issued on February 11, 2015 with the following results:

Approximate number of eligible voters	33
Void ballots	2
Votes cast for Petitioner	11
Votes cast against participating labor organization	2
Valid votes counted	13
Challenged ballots	0
Valid votes counted plus challenged ballots	13

On February 18, 2015, the Employer timely filed Objections to conduct affecting the results of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, under the direction and supervision of its Regional Director, Region 5 conducted a preliminary investigation of the Employer's Objections. On March 19, 2015, the Regional Director issued a Report on Objections and Notice of Hearing overruling Objections 1, 2 and 5 in their entirety. The Regional Director found that Objection 3 should only be examined under limited circumstances, as will be discussed in greater detail below, and that Objection 4 raised substantial and material issues of fact which could best be resolved on the basis of record testimony taken at hearing.¹ Accordingly, the Objections addressed at hearing allege as follows:

Objection 3. The Board failed to mail duplicate ballot kits to voters who did not sign the identification stub.

Objection 4. One third of eligible voters did not receive ballots.

With respect to Objection 3, the Regional Director found that the Region did not mail duplicate ballot kits to two employees who returned void ballots to the Region on or about February 5, 2015. The Regional Director concluded that while duplicate ballot kits could have been sent to the employees, the two void ballots were not determinative of the election based on

¹ The numbering of the Objections reflects the numbers assigned to the Objections in the March 19, 2015 Report on Objections and Notice of Hearing.

the nine vote margin shown in Tally. Pursuant to *Davis & Newcomer Elevator*, 315 NLRB 715 (1995), the Regional Director decided that standing alone, Objection 3 was overruled. However, noting that Objection 4 also raises issues with potential determinative ballots, the Regional Director directed that the facts in Objection 3 be examined at hearing, but only to the limited extent of whether the two void ballots would become determinative in conjunction with the ballots alleged to be at issue in Objection 4.

A hearing was held before me on March 30, 2015 in Washington, DC. All parties were afforded an opportunity to be heard, to examine and cross-examine witnesses,² to introduce evidence bearing on the issues and to file post-hearing briefs. Neither party gave oral argument at the end of the hearing or filed a brief.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that Objection 4 be overruled in its entirety. As a result, the two void ballots addressed in Objection 3 are not determinative of the election and Objection 3 is also overruled in its entirety. Accordingly, as the Tally of Ballots shows that a majority of the valid votes counted have been cast for Petitioner, I recommend that a Certification of Representative issue.

Below, I will first present an overview of the procedural history of the case, followed by a discussion of parties' burdens and the Board standard for setting aside elections. Then I will discuss each Objection and related case law.

II. BACKGROUND

Guardsmark, LLC, provides security services at a number of locations, including the Providence Hospital in Washington, DC, the only location involved herein. There are approximately 33 guards employed at the Providence Hospital site. On December 19, 2014, International Union, Security, Police, and Fire Professionals of America (SPFPA) filed the petition with Region 5 seeking to represent a unit of security officers employed by the Employer at Providence Hospital. Pursuant to the Stipulated Election Agreement signed by the parties, the employees in the following unit voted on whether they wished to be represented by the Petitioner:

All full-time and regular part-time security officers employed by the Employer at Providence Hospital in Washington, DC, but excluding office clericals, professional employees, managerial employees, and supervisors as defined in the Act.

² I reviewed, considered and gave appropriate weight to all testimony in light of the entire record. The facts found in this report are based on the record as a whole, as well as my observation of the witnesses.

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000). Therefore, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show that the conduct in question affected the employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005).

In order to set aside an election based on Board agent misconduct or Regional Office procedural irregularities, the objecting party must show that there is evidence that raises a reasonable doubt as to the fairness and validity of the election. *Durham School Services, LP*, 360 NLRB No. 108, slip op. at 4 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969); see also *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42 (2010). If the evidence is insufficient, then the objecting party has failed to meet its burden. *Consumers Energy Co.*, 337 NLRB 752 (2002). It is also the case that procedural irregularities, standing alone, are not sufficient to set aside an election. *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2006).

IV. FINDINGS

In its Objections, the Employer claims that the Region failed to mail ballots to 11 of 33 employees. The Employer did not identify the 11 employees in its Objections or during the hearing. However, the Employer presented six employee witnesses during the hearing to testify about receipt of their ballots. In addition, the Employer made an offer of proof asserting that two other employees did not receive ballots. As noted, the Employer also contends that the two employees who submitted void ballots should have been sent duplicate ballots. This brings the total number of ballots contested at hearing by the Employer to ten.³

The Notice of Election

The record revealed that a Notice of Election was properly and timely posted by the Employer in conspicuous places in accordance with Section 103.20 of the Board's Rules and Regulations. The Notice was posted in the guard's office where the security guards report on a regular basis. The Notices were large (25 ½" by 14"), bold-blue posters, each with a banner

³ During the Hearing, the Representative for the Region informed the parties that two ballot kits were returned as undeliverable to the Region by the U. S. Postal Service; the Report on Objections, in footnote 7, had only reported one. The Representative for Region also informed the parties that one of those ballot kits was intended for one of the Employer's 11 contested employees and one was not. No evidence was introduced indicating that the Region had addressed the ballot kits incorrectly. Footnote 8 of the Report on Objections indicated that three ballots were received after the count. During the hearing, the Representative for the Region informed the parties that those ballots were from employees Chimere Bryant (duplicate ballot), Andre Dawkins and Donald Johnson.

reading "NOTICE OF ELECTION" running across the top, and they provided employees with the following information concerning the mail ballot procedure:

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 3:00 p.m. on Wednesday, January 28, 2015, ballots will be mailed to eligible voters from the National Labor Relations Board, Region Five, Bank of America Center, Tower II, 100 South Charles Street, Suite 600, Baltimore, MD 21201. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, February 4, 2015, should communicate immediately with the National Labor Relations Board by calling the Baltimore Regional Office collect at (410) 962-2219. All ballots will be commingled and counted at the Baltimore Regional Office on Wednesday, February 11, 2015, at 3:30 p.m. In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots.

Testimony Concerning Receipt of Ballots⁴

The Employer presented six employees in support of Objection 4 and made an offer of proof concerning two additional employees who were subpoenaed but did not appear at the hearing. The testimony and offer of proof are described below.

Chimere Bryant

Chimere Bryant testified that she did not receive a ballot by February 4. Bryant moved in March 2014 and the *Excelsior* list⁵ showed Bryant's former address, although Bryant had informed the Employer of her new address, shortly after she moved. Bryant also testified that she contacted the Regional Office in order to obtain a ballot at some point during the week of February 4, but could not recall the exact date. She gave the Regional Office her correct address and a duplicate mail ballot kit was mailed to her. Bryant testified that she received the duplicate mail ballot kit on February 10 and mailed her ballot to the Baltimore Regional Office from a Washington, DC post office on the same day. She said that she gave her ballot "a 50/50 chance of getting to Baltimore" on time. Bryant's duplicate ballot was received by the Regional Office on February 19, eight days after the count. The envelope only showed the NLRB "received" stamp of February 19, 2015. There was no postmark on the envelope or other date stamp.

Anthony Adkinson

Anthony Adkinson testified that he did not receive a ballot and that the address listed on the *Excelsior* list is his former address; he moved about two years before the election. Adkinson

⁴ All dates are 2015, unless otherwise noted.

⁵ The *Excelsior* list is the list of eligible voters prepared by the Employer.

stated that he believed he informed the Employer of his move and that he received mail from the Employer at his current address after he moved. Adkinson stated that he was aware of the mail ballot election, but was unaware of the procedure for contacting the Regional Office in order to procure a duplicate ballot until sometime after the votes were tallied. Although Adkinson saw the posted Notice of Election, he did not read it, and he did not call the Regional Office to request a duplicate ballot.

Inetta Whitfield

Inetta Whitfield testified that she received a mail ballot kit but by the time she opened the kit, it was too late to vote. As a result, Whitfield did not submit a ballot in the election. Whitfield could not recall the exact date she received the mail ballot kit, but she recalled with certainty that when she opened it, she noticed that the due date for the Region's receipt of the ballots, February 11, had already passed. In this regard, Whitfield explained that she sometimes does not open her mail until a few days after she receives it. Whitfield further testified that she knew about the mail ballot election through talk from her coworkers but that she did not see the Notice of Election posted in the guard's office, where she reports for work each day. Whitfield explained that she does not look at anything posted on the board unless it has her name on it. Whitfield testified that she was unaware that she could call the Regional Office if she did not receive a ballot by February 4, and she never called the Region to request a ballot.

Taniecia Byrd

Taniecia Byrd testified that she never received a ballot. She stated that she was aware of that an election was going to be held and she saw the posted Notice of Election but did not read it. Byrd stated that her address is "1255 Stevens Rd, Washington, DC 20020, Southeast." Her address appears on the *Excelsior* list as "1255 Stevens Rd. Washington, DC 20020," with no reference to "Southeast." Byrd did not know whether mail is generally delivered to her if the reference to "Southeast" is missing from the address. Byrd did not testify whether or not she was aware that she could contact the Region for a duplicate ballot, but in any case, she did not contact the Region.

Dontae Mitchell

Dontae Mitchell testified that he did not receive a mail ballot. Mitchell's address appears correctly on the *Excelsior* list and he was aware that an election was taking place. He stated that he saw the Notice of Election posted in the guard's office, but did not read it. Mitchell also stated that he was aware of the procedure for contacting the Regional Office in order to obtain a duplicate ballot, but he did not call the Regional Office.

Kevin Pate

Kevin Pate testified that he did not receive a mail ballot. Pate confirmed that he receives mail at the address listed on the *Excelsior* list,⁶ and he was aware that a mail ballot election was taking place. He saw page two⁷ of the Notice of Election posted in the guard's office, but did not read it. He stated that he was not aware of the procedure for calling for a ballot prior to February 11, and he did not call the Regional Office to obtain a duplicate ballot.

Donald Hines and Darren Jones

During the hearing, Counsel for the Employer stated that the Employer had served subpoenas on employees Donald Hines and Darren Jones but neither appeared at the hearing. Both Hines and Jones are named on the *Excelsior* list. In an offer of proof, Employer Counsel indicated that Hines and Jones would testify that they did not receive ballots. Employer Counsel requested that the hearing remain open so he could seek enforcement of the subpoenas. I denied the request because I determined that I could make a decision based on the record evidence. Further subpoena proceedings would have substantially delayed a determination in this case.

V. RECOMMENDATIONS

Based on the Employer's argument in its Objections and the evidence adduced at hearing, it appears the Employer, in substance, contends that this election was fatally flawed based on low voter participation and mail ballot irregularities. Specifically, the Employer asserts that a number of employees large enough to affect the results of the election experienced some problem with the balloting. After considering the record evidence and the relevant case law, I find that that the voters had adequate notice and opportunity to participate in the election, notwithstanding low voter turnout.

The Lemco Standard

In *Lemco Construction, Inc.*, 283 NLRB 459 (1987), the Board determined that election results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The Board declared it will not apply a percentage test of eligible voters voting to determine the validity of an election, rather, it will find an election to be valid if: (1) all employees have received adequate notice of the election; (2) all employees were given adequate opportunity to vote; and (3) employees were not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics

⁶ Pate's address on the *Excelsior* list has "Upper Marlboro" as the city. Pate testified that the city is actually "Largo." However, the zip code is correct and Pate said that he receives his mail whether the city is listed as "Upper Marlboro" or "Largo."

⁷ The Notice of Election is a document consisting of three legal size pages. Pages one and three contain boilerplate language with general information on NLRB elections and employee rights. Page two contains the details specific to the particular election. In this case, page two listed the details and instructions concerning the mail ballot election, including the procedure for contacting the Regional Office if a ballot is not received.

of the election. See also *Northern Star Realty Co.*, 283 NLRB 1159 (1987); *Community Care System*, 284 NLRB 1147 (1987). In *Lemco*, only one out of eight eligible voters cast a ballot because some employees were absent and a group of employees arrived at the polling place after the polls closed. Despite the low voter participation, the Board dismissed the Objection to the election and determined that election results should be certified where all eligible voters had adequate notice and opportunity to participate in the election.

The *Lemco* standard was applied in *Sitka Sound Seafoods*, 325 NLRB 685 (1998) where the Board upheld a mixed mail manual election in which only 64 of the 92 employees on the *Excelsior* list voted. In *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089 (D.C. Cir. 2002), the Court upheld a Board election in which the *Lemco* standard was applied to a strictly mail ballot election where a determinative number of voters testified that they did not receive mail ballots. See also *Northern Star Realty Co.*, supra (election upheld where only one of two employees voted since employee had adequate notice and opportunity and was not prevented from voting by any party). Cf. *Star Baking Co.*, 119 NLRB 835 (1957) (election set aside where employee did not receive a mail ballot and did not have opportunity to vote because he was stationed 45 miles from the polling place).

The Employer relies in its Objections on two cases involving inclement weather: *Baker Victory Services*, 331 NLRB 1068 (2000) (severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote) and *V.I.P. Limousine, Inc.*, 274 NLRB 641 (1985) (election set aside because of snowstorm, despite 75% of eligible voters voting). These cases are distinguishable as no such weather event is involved here.⁸

Application of Lemco

The first prong of the *Lemco* standard requires adequate notice. The parties in the subject case stipulated that the Notice of Election was posted in conspicuous places in accordance with the Board's Rules and Regulations. Specifically, the record revealed that the Notice was posted in the guard's office where employees report for work. Five of the six employees who testified stated that they saw the Notice of Election posted; only employee Whitfield did not see it. Whitfield explained that, while she was in the guard's office around the time of the election, she does not look at postings unless she sees her name. The Board has never required that employees receive *actual* notice of an impending election. Rather, the standard has always been that reasonable measures must be taken to assure that unit employees are aware of their right to exercise freely their franchise in a Board-conducted election. This is traditionally accomplished through the posting of the official notice of election in conspicuous places prior to the election. *Jowa Security Services, Inc.*, 269 NLRB 297 (1984). Accordingly, I find that the employees received adequate notice of the election.

⁸ The other cases cited by the Employer in support of Objection 4, *Yerges Van Liners, Inc.*, 162 NLRB 1259 (1967) and *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956), are factually distinguishable. Both cases involve drivers who, in the course of their duties, were scheduled away from the polling site during the voting hours. The Board determined in both cases that the employees were not afforded an opportunity to cast their ballots.

The second prong of *Lemco* requires that employees have adequate opportunity to vote. I find that the election has met this standard. All six employees who testified were aware that an election was taking place. The Notice of Election contained instructions for employees who believed they were eligible to vote but did not receive a ballot-- it advised those employees to telephone the Baltimore Regional Office if a ballot was not received by February 4. Of the six employees presented by the Employer, only Bryant called the Regional Office to request a duplicate ballot. Four of the remaining employees saw the Notice but did not read it and they made no attempt to contact the Regional Office to obtain ballots. Whitfield chose not to read any posting and also did not contact the Regional Office. Whitfield and Pate testified that they were not aware that they could call the Regional Office to obtain a ballot. Mitchell testified that he was aware of the procedure, but he did not contact the Regional Office. The record did not indicate whether or not Byrd was aware of the procedure for requesting a duplicate ballot. The mail ballot election process anticipates that some employees might not receive their mail ballots, and has a procedure whereby any such employees can receive a duplicate ballot. This procedure is clearly outlined in the Notice. Here, five employees did not avail themselves of the procedure. The Board's responsibility is only to ensure that employees have an opportunity to vote; it cannot ensure that any individual employee takes advantage of that opportunity. The failure to vote may be attributable to apathy, inattentiveness or indifference. Regardless of the reason for not requesting a duplicate ballot, it was ultimately not the fault of the Petitioner or the Region as all employees in this case had an opportunity to vote. *Coast North America Trucking Ltd.*, 325 NLRB 980, 981 (1998) (employees had the opportunity to vote and that their choosing not to vote does not warrant setting aside the election); *National Van Lines*, 120 NLRB 1343 (1958) (employees who failed to return mail ballots by the established due date would not have their votes counted; they could have voted duplicate ballots had they not exhibited a "lack of diligence and interest"); *Antelope Valley Bus Co., Inc.*, supra (determinative number of voters who did not receive mail ballots had the opportunity to vote).

The third prong of *Lemco* requires that employees are not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics of the election. I find that no evidence was presented showing that an employee was prevented from voting by the conduct of a party or due to the unfairness of scheduling of the election.

As to the mechanics of the election, I find that no specific evidence was introduced showing any irregularity with the mechanics of the election. The Employer suggests that because some employees did not receive ballots, there was a problem with the mechanics of the election, despite the fact that the Employer produced no evidence of any irregularities. The record evidence showed that only two ballot kits were returned to the Region by the Post Office as undeliverable. There is no evidence indicating that the Region failed to properly address the envelopes, misplaced ballots or failed to count any ballots received in this election. Without more than a mere unsubstantiated or non-specific assertion of Regional misconduct, lost mail ballots in and of themselves do not rebut the presumption that the Region has performed as it should. *Antelope Valley Bus Co., Inc.*, supra; cf. *NLRB v. Pinkerton's Inc.*, 621 F.2d 1322 (6th Cir. 1980) (remand based on evidence indicating mail irregularity because all employees living in a particular area did not receive ballots).

The tally showed 11 "Yes" and 2 "No" votes. In order to analyze whether the disputed ballots from the six employees who testified are determinative, I will assume that the two void ballots are "NO" votes and that the two subpoenaed employees who failed to appear, Hines and Jones, would have cast "NO" votes. This hypothetical tally would bring the count to 11 for the Union and 6 against unionization. In other words, five more ballots could change the results of the election.

The record revealed that Employees Bryant and Adkinson did not receive ballots from the initial mailing and Bryant's duplicate ballot arrived after the ballots were tallied and, therefore, could not be counted. The record also revealed that the Employer provided incorrect addresses on the *Excelsior* list for both of these employees. In nearly all circumstances, an employer is estopped from relying on its own failure to comply with *Excelsior* requirements as a basis for setting aside an election. To hold otherwise would be to invite abuse. *Thiele Industries, Inc.*, 325 NLRB 1122 (1998). Accord *Berryfast, Inc.*, 265 NLRB 82 (1982) ("[w]here a party to an election, through its own action, negligence, or good-faith mistake, has prevented an eligible employee from voting, only the other, non-acting party has any foundation for an objection"). The Board has overlooked this principle in circumstances where employees have been disenfranchised through no fault of their own. For example, in both *Glen McClendon Trucking Co., Inc.*, 255 NLRB 1304 (1981), and *Cal Gas Redding, Inc.*, 241 NLRB 290 (1979), the Board set aside elections where employees were unable to vote because they were away from the polling place in the normal course of their duties for the employer. Here, Bryant and Adkinson were not disenfranchised because there was a procedure in place to obtain a replacement ballot. Since it was the Employer's mistake that caused Bryant and Adkinson not to receive ballots from the initial ballot mailing, the Employer is estopped from relying on its error to advance its Objection. Accordingly, I find no objectionable conduct relating to the ballots of Bryant and Adkinson.

Employees Pate, Mitchell and Byrd testified that they did not receive ballots and employee Whitfield's ballot arrived at her home either after the February 11 due date or only a few days before it was due. The record contains no evidence as to the reason for these problems. All four of these employees were aware that an election was taking place but did not take reasonable steps to obtain duplicate ballots. *National Van Lines*, supra. In *Antelope Valley Bus Co., Inc. v. NLRB*, supra, the Court ruled in similar circumstances that a party cannot meet its burden of establishing that the NLRB failed to mail out the ballots by showing that the Post Office failed to deliver ballots to a small number of employees. Accordingly, I find no objectionable conduct concerning the mail balloting procedures affecting Pate, Mitchell, Byrd and Whitfield. Moreover, even if the Region was negligent in the mailing of ballots to these four employees, their ballots would not be determinative because the Employer is estopped from raising an issue to the mailing of the ballots of the Bryant and Adkinson. Accordingly, I find no objectionable conduct relating to the ballots of Pate, Mitchell, Byrd and Whitfield.⁹

⁹ Even if the Employer had furnished correct addresses for Bryant and Adkinson, I would not find objectionable conduct relating to their ballots. They had adequate notice and opportunity to vote and were not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election.

I recommend that the Board overrule Objection 4. As a result, the two void ballots are not determinative of the election. Accordingly, Objection 3 is also overruled in its entirety.

IV. CONCLUSION

Based on the foregoing, the record as a whole, and applicable legal principles, I recommend that the Employer's Objections 3 and 4 be overruled in their entirety. The Employer has failed to meet the *Polymers* standard and therefore has not provided evidence that raises a reasonable doubt as to the fairness and validity of the election. As the Tally of Ballots shows that a majority of valid votes counted have been cast for the Petitioner, I recommend that a Certification of Representative issue.

V. EXCEPTIONS

Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **April 27, 2015, at 5 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A request for extension of time, which may also be filed electronically, should be submitted to the Regional Director and a copy of such request for extension of time should be provided to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on each of the other parties in the proceeding in the same manner or a faster manner as that utilized in filing the request with the Regional Director.

A copy of the exceptions must be served on each of the other parties to the proceeding, as well as on the Regional Director, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the

receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at Philadelphia, Pennsylvania, this 7th day of May, 2015

A handwritten signature in cursive script, appearing to read "K O'Neill", written over a horizontal line.

Kathleen O'Neill
Hearing Officer, Fourth Region
National Labor Relations Board

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTH REGION**

GUARDSMARK, LLC

Employer

and

Case 5-RC-143199

INTERNATIONAL UNION, SECURITY, POLICE,
AND FIRE PROFESSIONALS OF AMERICA
(SPFPA)

Petitioner

ERRATUM

On May 7, 2015, I issued a Hearing Officers's Report and Recommendations on Objections to Election, which contained the incorrect due date for filing exceptions. Accordingly, the Report is corrected in the following respect:

Replace **April 27, 2015** with **May 21, 2015**, the correct due date, on page 11 of the Decision.

Signed: May 8, 2015

/s/ Kathleen O'Neill
KATHLEEN O'NEILL
HEARING OFFICER

EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

GUARDSMARK, LLC,

Employer

and

Case 05-RC-143199

**INTERNATIONAL UNION, SECURITY, POLICE,
AND FIRE PROFESSIONALS OF AMERICA
(SPFPA)**

Petitioner

**REPORT ON OBJECTIONS
AND
NOTICE OF HEARING**

Pursuant to a Stipulated Election Agreement¹ approved by the undersigned on December 31, 2014, an election by mail-ballot was conducted. Under the Region's supervision, ballots were mailed at 3:00 p.m. on Wednesday, January 28, 2015, and the Tally of Ballots was issued on Wednesday, February 11, 2015 with the following results:

Approximate number of eligible voters.....	33
Number of void ballots.....	2
Number of votes cast for Petitioner.....	11
Number of votes cast against participating labor organization.....	2
Number of valid votes counted.....	13
Number of challenged ballots.....	0
Number of valid votes counted plus challenged ballots.....	13

On February 18, 2015 the Employer timely filed objections to the conduct of the election², a copy of which is attached as Exhibit A.

¹ All full-time and regular part-time security officers employed by the Employer at Providence Hospital in Washington, DC, but excluding office clericals, professional employees, managerial employees, and supervisors as defined by the Act.

²The petition was filed on December 19, 2014. I will consider on its merits only the alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962).

THE OBJECTIONS

Objection 1

The Regional Director Abused His Discretion by Insisting on Mail Balloting.

In support of its first objection, the Employer relied upon the Tally of Ballots in the instant case and the statement of Stephen Glazek, attorney on behalf of the Employer throughout the election proceedings. Glazek's statement was intended to provide an explanation of the circumstances surrounding the approval of the Stipulated Election Agreement (the Agreement) in this case. Within the statement, Glazek principally asserts the Employer desired to pursue a manual election; however, it elected to enter into the Agreement as a result of the Region's insistence on a mail-ballot election.

Analysis

On December 31, 2014, the Employer and Petitioner entered into the Agreement which provided that the election would be conducted by United States Mail. I subsequently approved the Agreement on January 8, 2015. By entering into the Agreement, and the terms contained therein, the Employer waived its right to object to the method of election defined in the document.³ In short, the Employer agreed to hold a mail-ballot election. Before entering into the Agreement, the Employer had a right to make a statement at a hearing that a mail ballot was inappropriate; however, it elected not to exercise this right.

For the reasons discussed above, the Employer is estopped from raising the method of election as grounds for setting aside the results of the election. Accordingly, Objection No. 1 is overruled.

³ In *Premier Living Center*, 331 NLRB 123 (2000), the employer stipulated to an LPN unit and then filed objections claiming the LPNs were supervisors. The Board subsequently adhered to the Hearing Officer's recommendation dismissing the objections because the Employer was bound to the Stipulated Election Agreement.

Objection 2

The Board Improperly Prohibited Guardsmark from Holding Mass Meeting with Employees on the Morning Ballots were Scheduled to be Mailed.

In support of its second objection, the Employer again relied upon the statement of Stephen Glazek. The Employer also provided (1) emails that Glazek maintains were sent to the Board agent handling the election, and (2) a copy of a January 26, 2015 letter from the Region which detailed the prohibition on speeches on company time to massed assemblies in advance of the election.⁴ The Employer claims the Region's communications regarding the prohibition were, at times, contradictory; and, it asserts that ultimately the Region wrongly instructed the Employer that it was prohibited from making speeches on company time to massed assemblies after 3:00 p.m. on Tuesday, January 27, 2015. Relying upon *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959), the Employer maintains it should have been permitted to hold mass meetings until 3:00 p.m. on Wednesday, January 28, 2015 when the ballots were mailed from the Baltimore Regional Office.

Analysis

There is a 24-hour prohibition against mass meetings by employers prior to the start of a manual election as established in *Peerless Plywood Co.*, 107 NLRB 427 (1953). This prohibition is explicitly extended to mail-ballot elections with stipulated election agreements by *American Red Cross*, 322 NLRB 401 (1996).

The Employer's reliance on *Oregon Washington Telephone Co.* is not appropriate in the instant case. In *Oregon Washington Telephone Co.*, the Board held that a mass meeting conducted within 24-hours of the election did not violate the Act because the Employer was not put on notice about the time and date for sending mail ballots. *Id at 341*. The Board in

⁴ It should be noted that the emails in question were sent to an incorrect email address, as they included the tail @nlrb.com instead of @nlrb.gov.

American Red Cross, narrowed the holding of *Oregon Washington Telephone Co.*, explaining that a Region's failure to send a formal notice of the date and time was immaterial where the employer entered into a stipulated election agreement that included the date. *Id* at 401. Here, it is undisputed that the Employer had the requisite notification, as the date and time of the mailing was included in the Agreement, as well as the Notice of Election. Furthermore, during the January 26, 2015 pre-election conference call and in an email that followed the conference call, the Region advised the parties to the election that the prohibition on mass meetings would begin at 3:00 p.m. on Tuesday, January 27, 2015.⁵

Based on the foregoing, Objection No. 2 is overruled.

Objection 3

Board Failed to Mail Duplicate Ballot Kits to Voters Who Did Not Sign Identification Stub

In support of its third objection, the Employer submitted the statement of Erika Johnson, Head of Human Resources for the Employer's Washington D.C. branch. The Employer contends Johnson contacted the two employees in the instant case who submitted void ballots to inquire as to whether they received a duplicate ballot kit. According to Johnson, the employees informed her they did not receive a duplicate ballot from the NLRB, nor were they notified of the deficiencies in the original ballots they returned to the NLRB.

Analysis

Pursuant to *Davis & Newcomer Elevator*, an election can be set aside if duplicate ballot kits are not sent to those voters who submitted deficient ballots only if (1) there is sufficient time remaining before the deadline, and (2) the void ballots would prove determinative of the election. 315 NLRB 715 (1995); See also *Oneida County Community*

⁵ A copy of the January 26, 2015 email is attached hereto as Exhibit B.

Action Agency, 317 NLRB 852 (1995). Accordingly, if the ballots are not determinative of the election then a failure to send duplicate kits would not require a rerun of the election, regardless of any timeliness issue. *Id.*

In the instant case, the Region received the void ballots on or about February 5, 2015; and, duplicate kits were not sent to the two employees who submitted the void ballots. While duplicate kits could have been sent to the voters, the fact remains the void ballots were not determinative of the election. As noted above, the Tally of Ballots included 13 valid votes; 11 favored the Petitioner and 2 voted against the Petitioner. Given the nine vote margin, the two void ballots were not determinative. Since the ballots had no determinative weight, this argument fails under the two-prong analysis described above.

The Employer contends the two void ballots should be weighed along with 11 other employees who did not submit ballots.⁶ The Employer argues that the aggregation of these ballots would go to show total disenfranchisement.

Standing alone, Objection No. 3 is overruled. However, as will be discussed in greater detail below, Objection 4 appears to raise substantial and material issues that can best be resolved by record testimony and evidence. When Objection No. 3 is examined in conjunction with Objection No. 4, the combined number of ballots alleged to be at issue may become determinative.

Accordingly, I hereby direct that the facts in Objection 3 – two employees who submitted void ballots were not sent duplicate kits – be analyzed at a hearing, but only to the limited extent of whether the two void ballots would become determinative.

⁶ The Employer also cites these eleven employees in its fourth Objection.

Objection 4

One Third of Eligible Voters Did Not Receive Ballots

In support of its fourth objection, the Employer submitted the statements of Erika Johnson, and Larry Covington, Site Manager for the Employer at Providence Hospital in Washington, D.C. Both witnesses claim that following the February 11, 2015 ballot count in the instant case, they polled a total of 18 Unit employees. According to the witnesses, 11 of the 18 employees indicated they never received ballots from the NLRB. The seven remaining employees informed the witnesses that they received ballots, but did not vote in the election. The Employer maintains the Board has held that elections should be set aside under such circumstances. *Yerges Van Liners, Inc.*, 162 NLRB 1259 (1967); *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956); and *Baker Victory Services*, 331 NLRB 1068 (2000), quoting *V.I.P. Limousine, Inc.*, 274 NLRB 641 (1985).

Analysis

The Board possesses a wide authority to set aside election results when a significant number of employees have not had the opportunity to vote. *Pepsi-Cola Bottling Co. of Princeton, Inc.*, 176 NLRB 716, 729 (1969). "Such discretion includes the determination of whether or not the opportunity afforded all eligible voters to exercise their rights was sufficiently 'adequate' or 'equal' as to reflect accurately the 'majority' required by the statute." *International Telephone & Telegraph Corp.*, 129 NLRB 221 (1960). The Board has delegated broad authority to the Regional Director to conduct and supervise elections, *See* 29 C.F.R. § 101.21; thus he or she is vested with the same discretion.

The Employer's reliance on *Yerges Van Liners, Inc.* and *Alterman-Big Apple, Inc.* is misplaced. In both cases, the Board elucidated its own authority, vested in the Regional

Director, to set aside elections at its discretion based on evidence that tends to show that a significant number of employees have not had the opportunity to vote. While this line of cases established the Regional Director's authority to set aside elections, it established no factual situation in which the Regional Director must set aside an election.

The Employer's other citations –*Baker Victory Services* and *V.I.P. Limousine, Inc.* – purported to show a requirement to set aside elections, however the situations presented in these cases are not analogous to the instant case. In the aforementioned cases, the elections were set aside for inclement weather events which prevented a significant amount of voters from casting ballots.

The Board in *Glass Depot*, declared that when faced with having to decide whether an act or unexpected event constitutes “extraordinary circumstances” justifying a new election, it would examine both the event itself and whether it resulted in less than a representative complement of voters casting ballots. 318 NLRB 766 (1995), *reaffirmed in Baker Victory Services*, 331 NLRB 1068 (2000). It declined to give a precise percentage figure, stating that the representative complement test represents a balance between the value of employee opportunity to vote and the values of finality and economy. Nevertheless, it stated that if the participation rate dropped below 50 percent, a “substantial cause of concern” would exist, if there were an “event” that restricted voting. The Board in *Sitka Sound Seafoods, Inc.*, 325 NLRB 685, 686 (1998) found that since no such “event” occurred, then an examination under *Glass Depot* was inappropriate, and accordingly overruled the objection. Here, there is no asserted event that is alleged to have occurred that reduced the number of eligible voters from casting ballots.

The Employer is implicitly alluding that a numerical deficiency is evidence that employees did not vote, which led them to collect more evidence. In *Lemco Construction*, the Board overruled prior precedent which allowed a numerical test to determine the validity of a representation election. 283 NLRB 459 (1987). Further, throughout this same line of cases, a standard emerged to analyze if a complement of voters had participated in the election. *Sitka Sound Seafoods, Inc.*, Supra. A representative complement has voted if (1) all employees have received adequate notice of the election; (2) all employees have been given adequate opportunity to vote; and (3) employees are not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics of the election. *Id.*

Here, adequate notice was given to employees by the Employer's posting of the Notices of Election. This notice advised employees who did not receive ballots to contact the Region; and, the eligibility list in the instant case, which was signed by both of the Employer's observers, confirms that the Region provided duplicate ballot kits to two employees who timely requested them. With respect to the second point listed above, the mail ballot process impliedly affords employees the adequate opportunity to vote. *Nat'l Van Lines*, 120 NLRB 1343, 1346 (1958) (Regional Director's decision to conduct a mail ballot was designed to afford an adequate opportunity for all eligible voters to cast a ballot). Additionally, the ballots were mailed in accordance with the addresses supplied by the Employer; and, only one ballot was returned to the Region.⁷ Finally, no party has alleged that it was the conduct of either party that caused the low voter turnout.

⁷ The lone returned ballot included a Return to Sender notification dated February 26, 2015; and, it cited insufficient address as the reason for the return.

Despite the aforementioned caselaw and facts, the Employer has still presented evidence that may show a determinative number of employees did not receive ballots. As noted above, the statements provided by the Employer suggest approximately 11 employees may not have received ballots. There are inconsistencies in the claims of the employees listed in the statements, as the Region received three ballots from employees who the Employer maintains never received a ballot.⁸ Even if these three ballots are removed from consideration, the remaining eight ballots combined with the void ballots described above in Objection 3 may show a determinative number of employees did not receive ballots.

As it appears substantial and material issues have been raised that can best be resolved by record testimony and evidence, I hereby direct that a hearing be held with respect to the issues raised by Objection 4.

Objection 5

The Election Notice Did Not Provide Adequate Notice to Eligible Voters

In support of its fifth objection, the Employer relies upon the Notice of Election in the instant case. The Employer maintains that (1) no designated Board agent was specifically named on the Notice, and (2) the phone number listed on the Notice connected callers with an automated answering machine.

Analysis

With respect to the Employer's first assertion, the Region has long maintained a policy of refraining from listing individual Board agents on Notices of Election. The Region's policy is permitted by NLRB Casehandling Manual (Part Two) Representation

⁸ The Region received these ballots on February 12, 2015, February 19, 2015 and March 4, 2015.

Proceedings Sections 11336.3 which does not explicitly require that a designated employee's name be listed on the Notice of Election.⁹

Regarding the second assertion, the Employer incorrectly states that the number provided on the Notice of Election directed callers to an automated line. The number provided on the Notice of Election, which was posted by the Employer and included in the ballot kits, is the direct line for the Region's Election Specialist. Though no name is explicitly provided, the Election Specialist is a full-time employee who answers phone calls concerning election-specific questions and is specially trained to resolve any election-related problems. The Region does list its main number on the Instructions to Eligible Employees; and, outside of normal business hours, this line is automated. During the course of normal business hours, administrative personnel answer and direct calls received on the main number. Contrary to the Employer's claim, the Region's aim in listing the main number is to provide employees with as many options as possible to contact the Region should they have questions regarding the election. Significantly, the Employer has not asserted that any employee, Employer representative, or Petitioner representative attempted to reach the Region unsuccessfully through the numbers provided on the Notice of Election and Instructions to Eligible Employees.

Based on the foregoing, Objection No. 5 is overruled.

⁹ Moreover, while the Region's position is that all procedural requirements have been met, the Casehandling Manual, by its own terms, is not intended to be binding authority or rules of procedure. *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988), enfd. mem. 902 F.2d 40, 41 (9th Cir. 1990).

SUMMARY

In summary, I am overruling Objections 1, 2 and 5 in their entirety. I am also overruling Objection 3; however, my decision to overrule includes the caveat that the facts in Objection 3 – two employees who submitted void ballots were not sent duplicate kits – will be analyzed at a hearing, but only to the limited extent of whether the two void ballots would become determinative. Finally, substantial and material issues have been raised by evidence provided in support of Objection 4. Thus, it is the opinion of the undersigned that those issues can best be resolved on the basis of record testimony and/or other evidence developed at a hearing.

NOTICE OF HEARING

IT IS HEREBY DIRECTED, pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that a hearing be held in, **THE DIVISION OF JUDGES HEARING ROOM, NATIONAL LABOR RELATIONS BOARD, 1099 14th STREET, N.W., 5th FLOOR, WASHINGTON, DC**, on **March 30, 2015** beginning at **10:00 a.m.**, and continuing on consecutive days thereafter until completed, before a Hearing Officer of the National Labor Relations Board, who will take testimony for the purpose of resolving the issues raised by the Petitioner's Objections herein, at which the parties have the right to appear in person, or otherwise, and give testimony. The Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 14 days from the issuance of such report, any party may file with the Board in Washington, DC, an original and seven copies of exceptions thereto. Immediately upon filing such exceptions, the party filing the same shall serve a copy thereof on

the other parties and shall file a copy with the undersigned. If no exceptions are filed thereto, the Board may decide the matter forthwith upon the record or make other dispositions of the case.

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **April 2, 2015, at 5 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹⁰ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

¹⁰ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under the Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Baltimore, Maryland, this 19th day of March 2015.

(SEAL)

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE**

Guardsmark, LLC,

Petitioner-Employer,

and

**International Union, Security, Police, and
Fire Professionals of America (SPFPA),**

Labor Organization.

Case 05-RC-143199

GUARDSMARK'S OBJECTIONS TO THE CONDUCT OF THE ELECTION

For the reasons stated below, Guardsmark, LLC ("Guardsmark") objects to conduct affecting the election held in this matter between January 28, 2015 and February 11, 2015, among the full-time and regular part-time security officers employed by Guardsmark at Providence Hospital in Washington, D.C. Guardsmark reserves its right to fully document the basis for its Objections through evidentiary submissions and any investigation or evidentiary hearing conducted by the Board.

Summary

This election was fraught with errors and problems that cumulatively led to the disenfranchisement of almost 40% of the eligible voters:

1. The Regional Director improperly insisted upon a mail ballot over the request of Guardsmark for a manual ballot;
2. The Regional Director improperly refused the Guardsmark's request to hold a mass meeting with the employees in the hours prior to the ballots being mailed (thus limiting notice to employees about the election);
3. One third, eleven out of thirty-three, eligible voters did not receive ballots;

4. Two out of the fifteen voters who did submit ballots failed to sign the identification stub and the Region did not provide them new ballots;
5. Thirteen out of thirty-three (about 40%) of eligible voters were disenfranchised; and
6. The notice of election did not identify a Board Agent for the voters to speak with in case of problems, thus exacerbating the prior errors.

The Board has consistently held that “the primary consideration in the conduct of any election is whether the *employees* are given adequate notice and sufficient opportunity to vote.” *Cities Service Oil Co. of Pennsylvania*, 87 NLRB 324, 328 (1949) (emphasis in original). Yet, the overall effect of the election procedure employed here has resulted in inadequate notice to eligible voters and an insufficient opportunity to vote. Several errors have cumulatively resulted in an unfair election in which approximately 40% of eligible voters were disenfranchised. Guardsmark objects to the conduct of this election and requests that it be set aside because of the cumulative effect the errors had on the election.

Regional Director Abused His Discretion by Insisting on Mail Balloting

Guardsmark’s first objection is to the Regional Director requiring a mail ballot. The Regional Director does have discretion to require mail balloting, but that discretion “is not unfettered”. In *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998), the Board held that a manual election is the general rule; not a mail election.

A Regional Director’s discretion, however, is not unfettered and is to be exercised within certain guidelines. Because of the value of having a Board agent present at the election, the Board’s long-standing policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location.

Because a manual election is the general rule, the Regional Director must consider the following when determining whether to hold a mail ballot:

When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration

at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern.

See id. at 1145.

Here, the Regional Director only considered the cost to the Board for the election and did not consider the interests of the voters. Guardsmark requested a manual election and informed the Board Agent that its client (Providence Hospital) would not permit a poll to be on the hospital property, but that Guardsmark was searching for an off-site location near the hospital to hold the election. Guardsmark also requested two different time blocks for the poll to be open, so that all unit members could vote either before or after their shifts ended. Two blocks were necessary since the unit works three different shifts. (Witness Stephen Glazek.) The Board Agent indicated that given the small size of the unit and the number of hours the voting poll would have to be open to cover all three shifts, the Regional Director would not agree to a manual election and that the election would have to be completed by mail balloting. The principle reason given was that the size of the unit did not justify the cost of keeping the polls open—the Board did not want to pay to keep the polls open long enough to allow all three shifts to vote before and after work. (Witness Stephen Glazek.) As a result of the Regional Director’s insistence on mail balloting (and discretion in ultimately determining the manner by which the voting would occur), Guardsmark moved forward with the stipulated election agreement, including mail balloting.

The Regional Director's sole consideration of the economic interests of the Board did not take into consideration that the voters were not scattered, nor picketing. As evidenced by the fact that only fifteen out of thirty-three eligible voters attempted to vote and only thirteen out of thirty-three were able to submit valid ballots, mail balloting was not calculated to allow all eligible voters to vote. This election cannot be considered indicative of the will of the unit members as a determinative number were disenfranchised. It was an abuse of discretion to force a mail ballot election here.

The Board Improperly Prohibited Guardsmark From Holding Mass Meeting with Employees on the Morning Ballots were Scheduled to be Mailed

Guardsmark's second objection is to the Regional Director's decision to prohibit Guardsmark from holding a mass meeting with employees the morning of the day the ballots were scheduled to be mailed at 3:00 p.m.. Where an election is conducted by mail, employers are prohibited from making speeches on company time to massed assemblies of employees from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for the ballots to return. *See San Diego Gas & Electric*, 325 NLRB 1143 (1998); *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959). However, in this election, the Region improperly prohibited Guardsmark from conducting a speech to an assembly of its employees a couple of hours before ballots were scheduled to be mailed.

Prior to the balloting, Guardsmark contacted the Board Agent to clarify that the Board would permit Guardsmark to hold its last mass meeting with employees earlier in the day prior to ballots being mailed to eligible voters. On January 21, 2015, the Board Agent indicated in a telephone call that Guardsmark was prohibited from conducting a mass meeting with employees twenty-four hours before the ballots were mailed. (Witness Stephen Glazek.) In response, Guardsmark emailed the Board Agent legal authority by which it had claimed a right to conduct

the last mass meeting on the morning of the day ballots were to be mailed. (Emails between S. Glazek and Board Agent). On January 23, 2015, Guardsmark again requested clarification of the Board's position. (Emails between S. Glazek and Board Agent). Then on the morning of January 26, 2015, the Board Agent confirmed that mass meetings with employees would not be permitted within twenty-four hours prior to the ballots being mailed. (Witness Stephen Glazek.) At 1:02 p.m. that same day, the Board faxed a letter to Guardsmark, in which it contradicted the Board Agent's directions from that morning, stating that Guardsmark could hold a mass meeting up until the time the ballots were scheduled to be mailed, citing the same law Guardsmark had previously provided to the Board Agent. (NLRB Facsimile, dated January 26, 2015.) When Guardsmark contacted the Board Agent again for clarification (Emails between S. Glazek and Board Agent), Guardsmark was told to ignore the written directions and not hold any mass meetings with employees within twenty-four hours before the ballots were scheduled to be mailed. (Witness Stephen Glazek.)

In an abundance of caution, Guardsmark did not hold any mass meetings with employees within twenty-four hours prior to the time set for the ballots to be mailed. However, Guardsmark had wanted to hold such a meeting on the morning of the day ballots were to be mailed (at 3:00 p.m.) in order to remind employees to look for ballots. As a result of this error, along with the rest of the errors in conducting this election, a large number of eligible voters were disenfranchised and the election out to be set aside.

Board Failed to Mail Duplicate Ballot Kits to Voters Who Did Not Sign Identification Stub

Guardsmark's third objection is to the Region failing to send duplicate ballot kits to employees who submitted ballots without signing the identification stub. Failure of the Region to provide duplicate mail ballot kits to voters who fail to sign the identification stub can be grounds for setting aside an election where the votes may be determinative. *Davis & Newcomer*

Elevator Co., 315 NLRB 715, 715 (1994). Here, two of the fifteen ballots that were returned to the Region were declared void by the Board Agent because they did not have signatures on the identification stub. However, neither of the two voters were sent duplicate ballot kits from the Region. (Witness Erika Johnson.) These votes, taken in consideration with the eleven other voters who never received ballots are determinative of the election. The election ought to be set aside.

One Third of Eligible Voters Did Not Receive Ballots

Guardsmark's fourth objection is to the Region failing to mail ballots to eleven of the eligible voters. It is the responsibility of the Board to establish the proper procedure for the conduct of its elections so that all eligible voters be given an opportunity to vote. *See Yerges Van Liners*, 162 NLRB 1259, 1260 (1967); *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956).

The Board is responsible for establishing the proper procedure for the conduct of its elections. In carrying out this responsibility, a primary concern of the Board is whether employees are given a sufficient opportunity to vote. While the Board is not required to guarantee that every voter is able to get to the polls, when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted. If there is a reasonable possibility that this occurred and a determinative number of votes are called into question, to maintain the Board's high standards, the election must be set aside.

Baker Victory Services, Inc., 331 NLRB 1068, 1069–1070 (2000), *quoting* V.I.P. Limousine, Inc., 274 NLRB 641 (1985) (holding that an election ought to be set aside where a massive snow storm prevented a sufficient number of voters to vote).

Here, eleven out of the thirty-three eligible voters, *one-third of the eligible voters*, did not receive a ballot in the mail from the Region. (Witnesses Erika Johnson and Larry Covington.) As a result, these eleven eligible voters were denied the opportunity to vote through no fault of their own. There is no question that these eleven ballots are determinative of the

election since the vote was eleven in favor of the union and two against. This is not the situation where one or two ballots out of hundreds were not sent to voters. The failure here is material. The requisite laboratory conditions under which elections must be conducted were destroyed because one third of eligible voters were not provided ballots. The election ought to be set aside.

The Election Notice Did Not Provide Adequate Notice to Eligible Voters

Guardsmark's fifth objection is that the Region failed to provide proper notice to voters about whom to contact should they not receive ballots. The NLRB Case Handling Manual, § 11336.3, provides that the notice to employees requires the name of a person to contact when ballots do not arrive on time for voting:

The following language should appear on the notice of election:

Voting will be by mail. If you believe you are an eligible voter and you do not receive a ballot in the mail by [date—2 or 3 days after the last date any ballots should have been received], communicate immediately with [designated Regional Office employee, Regional Office address, and designated Regional Office employee's telephone number].

As indicated in Sec. 11336.2(c), the designated Regional Office employee named on the notice of election as the contact person should be an individual who is readily available in the event voters attempt to contact him/her. If foreign language voters are involved and translations are being provided (Sec. 11315.2), sufficient arrangements should also be made to deal appropriately with foreign language inquiries (Sec. 11315.3).

(Emphasis supplied.)

The notice here did not designate a Regional Office employee to be contacted should ballots not arrive. *See* Notice. Instead, the employees were provided the phone number to an automated line where they could not speak with a real person. *Id.* This failure to provide an identified person with whom the eligible voters could speak exacerbated the problem of one-third of the eligible voters not receiving their ballots. Even if they had called the automated line, without a real person to talk with and verify they are following the proper process, the system

was set up against providing ballots to all eligible voters. There was no contact person readily available to assist eligible voters.

As a result of the election notice failing to conform to the requirements of the Case Handling Manual, eligible voters were not truly provided notice. In line with Rule 103.2(d), the election ought to be set aside because the eligible employees were not provided proper notice. *See also Terrace Gardens Plaza, Inc.*, 313 NLRB 571, 572 (1993) (“We also note that the notice-posting requirement in a mail ballot election serves an important purpose in that if for any reason an employee does not receive the mailing, the posted notice will inform the employee of the election and instruct that person to contact the Region to procure a ballot.”)

Conclusion

The cumulative effect of all the errors in the conduct of this election has resulted in the disenfranchisement of approximately 40% of the eligible voters. Thirteen voters did not get an opportunity to vote. Where only eleven people voted in favor of the Union and two voted against the Union, those thirteen disenfranchised voters are key to the outcome of the election.

The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.

New York Telephone Co., 109 NLRB 788, 790–791 (1954). Several irregularities in the conduct of this election resulted in a sufficient number of ballots not being considered. The election here ought to be set aside.

Respectfully submitted,

BARRIS, SOTT, DENN & DRIKER, PLLC



By: /s/ Melonie L.M. Stothers

Stephen E. Glazek (P23186)

Melonie L.M. Stothers (P65344)

Attorneys for Employer, Guardsmark, LLC

211 W. Fort Street, 15th Floor

Detroit, MI 48226

(313) 965-9725

sglazek@bsdd.com, mstothers@bsdd.com

Dated: February 18, 2015

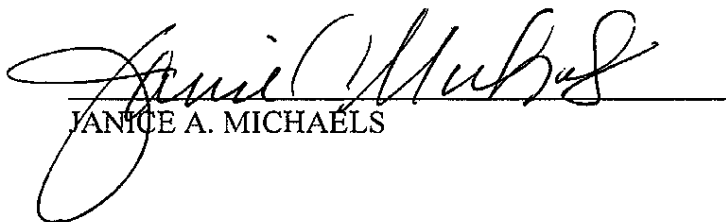
PROOF OF SERVICE

I hereby certify that on February 18, 2015, GUARDSMARK'S OBJECTIONS TO THE CONDUCT OF THE ELECTION, dated February 18, 2015, were served upon the following persons, addressed to them at the following addresses:

Mr. Joe McCray, Director
The International Union, Security, Police and Fire Professionals of America (SPFPA), Local 287
25510 Kelly Road
Roseville, MI 48066-4932
Fax: (586) 772-9644

Gordon A. Gregory, Esq.
Gregory, Moore, Jeakle & Brooks, P.C.
65 Cadillac Square
Suite 3727
Detroit, MI 48226-2893
Fax: (313) 964-2125

via facsimile and regular mail. I declare that the statements above are true to the best of my information, knowledge, and belief.


JANICE A. MICHAELS

447751v1

Colangelo, David A

From: Colangelo, David A
Sent: Monday, January 26, 2015 5:19 PM
To: 'sglazek@bsdd.com'; 'gordon@unionlaw.net'
Subject: 05-RC-143199: Guardsmark, LLC
Attachments: EXC.05-RC-143199.GUARDSMARK ELECTION ELIGIBILITY LIST _EXCELSIOR LIST_.pdf
Sensitivity: Personal
Flag Status: Completed

Gentlemen,

As I mentioned in today's pre-election conference call, the Region takes the position that employers and unions, which are parties to mail-ballot elections, are prohibited from making speeches on company time to massed assemblies beginning 24 hours prior to the time and date the ballots are scheduled to be sent out by the Region and continuing until the time and date set for their return. Accordingly, the parties in the instant case may not make speeches on company time to massed assemblies after 3:00 p.m. on Tuesday, January 27, 2015.

Additionally, please return a copy of the attached *Excelsior* list bearing your initials and the date on the first page and your signature and date on the second page.

Should you have any questions, please do not hesitate to contact me.

Thanks,

Dave

David Colangelo | Supervisory Field Examiner
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201
Phone: (410) 962-0180
Fax: (410) 962-2198

Exhibit B

EXHIBIT 3



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 5

Bank of America Center, Tower II
100 South Charles Street
Suite 600
Baltimore, MD 21201

Telephone: (410) 962-2822

March 25, 2015

Stephen Glazek
Barris, Sott, Denn & Driker, P.L.L.C.
211 W. Fort St. Fl. 15
Detroit, MI 48226-3269
By Regular Mail and Email

Re: Guardsmark, LLC
Case 05-RC-143199

Dear Mr. Glazek:

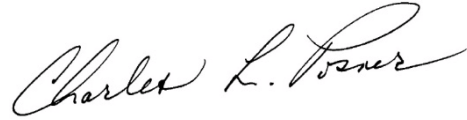
On March 20, 2015, the Region received your application for subpoenas *ad testificandum* and *duces tecum* in the above-captioned case. Within the application, you also requested that I issue a subpoena to the Region's Election Specialist or other agent(s) responsible for carrying out the mail balloting in this case. On March 23, 2015, the Region provided you with twelve subpoenas *ad testificandum* and a subpoena *duces tecum*. This letter shall serve as a response to your requests for the subpoena *duces tecum* and the subpoena *ad testificandum* to Regional Office staff.

Your application for the subpoena *duces tecum* requested that I issue such a subpoena for the production of documents from Region Five of the National Labor Relations Board. I view this request as improper under Section 102.118 of the Board's Rules and Regulations. Any such request for the production of documents from a Regional Office of the National Labor Relations Board must be made directly to the Office of the General Counsel, and I am not permitted to produce or present any such documents without the written consent of the General Counsel.

As for your request for testimony from the Region's Election Specialist or other agent(s) responsible for carrying out the mail balloting in the instant case, General Counsel's Memorandum 94-14 specifically delegates Regional Directors with the authority to allow Board agents to testify. However, Agency policy is to limit or preclude testimony of Board agents. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11429.1. In the instant case, I am willing to reserve my final determination regarding your request until such time when it can be determined that evidence adduced at the hearing in this case establishes that

(1) employees did not receive ballot kits; (2) employees had no opportunity to contact the Region in order to request duplicate ballots kits because the Notice of Election lacked instructions about how to do so; and/or (3) employees contacted the Region in order to obtain duplicate ballot kits but failed to receive them.

Very truly yours,

A handwritten signature in black ink, reading "Charles L. Posner". The signature is written in a cursive, flowing style with a large initial "C" and a distinct "P".

Charles L. Posner
Regional Director

cc: Melonie Stothers
Barris, Sott, Denn & Driker, P.L.L.C.
211 W. Fort St. Fl. 15
Detroit, MI 48226-3269

EXHIBIT 4



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Division of Operations-Management
1099 14th Street, NW, Suite 10200
Washington, D.C. 20570
(202) 273-2900 (Phone)
(202) 273-4274 (Fax)

March 27, 2015

Ms. Melony L. M. Stothers
Mr. Stephen E. Glazek
Barris, Sott, Denn & Driker, PLLC
211 W. Fort Street, 15th Floor
Detroit, MI 48226

Re: Guardsmark, LLC
Case 05-RC-143199

Dear Ms. Stothers and Mr. Glazek:

This letter is in response to your March 23, 2015 request for approval by the General Counsel for Board agent testimony and production of documents regarding the election in the above-referenced case. Specifically, you seek the testimony of the election specialist or other agent responsible for carrying out the mail balloting in this matter. You also seek production of the following documents.

1. All documents that evidence proof of mailing the ballot kits and any duplicate ballot kits in Case No. 05-RC-143199;
2. All documents that evidence the names of all voters who requested duplicate ballot kits and the dates on which those requests were made in Case No. 05-RC-143199;
3. All returned ballot kits and envelopes for the ballots returned to the Region after the counting of the ballots in Case No. 05-RC-143199;
4. All returned ballot kits and envelopes for the ballots that were declared void in Case No. 05-RC-143199;
5. The returned ballot kit in Case No. 05-RC-143199 that was identified as "Return to Sender" as noted in footnote 7 on page 8 of the Region's Report on Objections, dated March 19, 2015 in Case No. 05-RC-143199;
6. The eligibility list signed by Guardsmark's observers in Case No. 05-RC-143199; and
7. Copies of all evidence submitted by the International Union, Security, Police, and Fire Professionals of America (SPFPA) in response to Guardsmark's objections to the election in Case No. 05-RC-143199.

You explain that the purpose of the testimony of the agent is to establish how the mail balloting was conducted, when ballot kits were sent and received, and when requests for

duplicate ballots were received and when duplicate ballots were mailed, and that the purpose of the production of the documents requested is to establish how the mail ballot election was conducted, what happened to the ballots, and when they were sent and received.

According to the February 11, 2015 Tally of Ballots in the mail ballot election in this matter, there were approximately 33 eligible voters, 11 votes for and 2 votes against the Petitioner, with 2 void ballots and no challenged ballots. In the Regional Director's March 19, 2015 Report on Objections and Notice of Hearing, the Regional Director found, with respect to the two ballots that were voided because the voters failed to sign the identification stub on the mail ballot envelope, that the Region failed to send duplicate mail ballots kits to the two voters as required by CHM Section 11336.4(b). Because these two ballots are not by themselves determinative of the results of the election, the Regional Director directed that his finding regarding these two ballots be considered in the context of the sole issue set for hearing in this matter, Objection 4 alleging that "One Third of Eligible Voters Did Not Receive Ballots." In support of Objection 4, the Employer asserts that 11 employees (other than those who submitted the void ballots) did not receive ballots.

Your request has been carefully considered. The materials sought in Request 4 above are not relevant to Objection 4, as they do not relate to the 11 employees who allegedly did not receive ballots. Nor have you explained the relevance of the documents sought in Request 7. Accordingly, these requests are denied.

With respect to the returned ballot kit sought in Request 5, counsel for the Region is authorized to inform the parties and the Hearing Officer at the hearing that this ballot kit was not sent to one of the 11 voters who allegedly did not receive a ballot. As the ballot kit itself has no further relevance to Objection 4, your request for the ballot kit is denied.

With respect to the late-returned ballot envelopes sought in Request 3, as indicated in the Report on Objections (p. 9) these ballot envelopes were returned by three of the 11 employees who allegedly did not receive ballots. Counsel for the Region is authorized to inform the parties and the Hearing Officer of the identity of the three employees and the dates the Region received the ballot envelopes, and to permit an inspection of the envelopes to confirm this information. As no further information about these ballot envelopes is relevant to Objection 4, and production of the ballot envelopes containing the employees' marked ballots for admission into the record risks revealing the employees' votes, your request for the production of ballot envelopes is in all further respects denied.

The only document the Agency possesses that is responsive to Requests 1, 2 and 6 is the eligibility (*Excelsior*) list that was used and marked at the ballot count and signed by the Employer's observers. Certain information on the marked eligibility list may be relevant to Objection 4 if, at the hearing, evidence is adduced that a determinative subset of the 11 employees did not receive ballots, that the addresses for this subset of employees were correct on the eligibility (*Excelsior*) list provided by the Employer, and that these employees timely contacted the Regional office to report the non-receipt of ballots as instructed in the Notice of Election.

It is the policy of the Office of the General Counsel not to produce and authenticate the eligibility list used at an election absent a showing of most unusual circumstances. This policy is based upon Board law acknowledging employees' fundamental Section 7 right to engage or not to engage in union or protected activity, including the right to refrain from voting in an NLRB-conducted representation election. *Paul Kossman d/b/a Parkway Center Inn*, 240 NLRB 192, 194 (1979). In assessing whether "most unusual circumstances" exist, the benefit derived from disclosing the checked-off eligibility list is weighed against the potential harm to employees' Section 7 rights.

In these circumstances, after evidence is adduced that a determinative subset of the 11 employees did not receive ballots, that the addresses for this subset of employees were correct on the eligibility (*Excelsior*) list provided by the Employer, and that these employees timely contacted the Regional office to report the non-receipt of ballots, counsel for the Region is authorized to inform the parties and the Hearing Officer whether the marked eligibility list indicates that ballots for these employees were counted. Counsel for the Region is also authorized, upon request, to allow the Hearing Officer to make an *in camera* inspection of the marked eligibility list to confirm this representation. The other information on the marked eligibility list does not appear to be relevant to Objection 4, and production of the marked list would reveal whether other employees cast ballots or did not cast ballots.

The procedure outlined above would provide the relevant information from the marked eligibility list without unnecessarily compromising the secrecy of the voters' choice of whether to cast a ballot. Accordingly, your request for production of the marked eligibility list is in all further respects denied. You may renew your request regarding the marked eligibility list should circumstances develop at the hearing which you believe warrant a reconsideration of your request.

With respect to your request for Board agent testimony, Regional Director Charles Posner, pursuant to his authority under Casehandling Manual (CHM) Section 11824.1(a) to approve certain requests for authorization under Section 102.118 of the Board's Rules and Regulations, has already responded by letter dated March 25, 2014. I endorse his approach. Absent a showing of most unusual circumstances, it is the policy of the Office of the General Counsel not to permit Board personnel to testify as witnesses with respect to the processing of unfair labor practice or representation cases. *Laidlaw Transit, Inc.*, 327 NLRB 315, 316 (1998). The reason for this policy is that the highly sensitive and delicate role of Board personnel in investigating and processing such cases would be seriously undermined if a real likelihood existed of a Board agent becoming enmeshed as a witness in a Board proceeding with respect to case handling matters. *Frank Invaldi, et al., A California Limited Partnership d/b/a Sunol Valley Golf and Recreation Co.*, 305 NLRB 493 (1991). The Regional Director's response indicates a willingness to reconsider this request under certain circumstances. At this point, I agree with the Regional Director that your request does not present a compelling basis to deviate from that long-standing policy.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

4

By:

Anne Purcell

/s/

Associate General Counsel

cc: Charles Posner, Regional Director, Region 5

EXHIBIT 5

UNITED STATES OF AMERICA ★ NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY UNITED STATES MAIL

PURPOSE OF THIS ELECTION

This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their Employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election.

SECRET BALLOT

The election will be by SECRET ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board. Voters will be allowed to vote without interference, restraint, or coercion.

Employees eligible to vote will receive in the mail instructions to Eligible Employees Voting By United States Mail, a ballot, a blue envelope, and a yellow self-addressed mail-ballot envelope needing no postage.

A sample of the official ballot is shown at the center of this Notice.

ELIGIBILITY RULES

Employees eligible to vote are those described under VOTING UNIT in this Notice of Election, including employees who are not on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS

An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge MUST be made at the time the ballots are counted.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers. This number to be determined by the Regional Director or agent in charge of the election. These observers act as checkers at the counting of ballots, challenge ballots, and otherwise assist the Regional Director or agent.

INFORMATION CONCERNING ELECTION

The Act provides that only one valid representation election may be held in a 12-month period. Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held, or who desires to raise any question concerning the holding of an election, the voting unit, or eligibility rules, may do so by communicating with the Regional Director or agent in charge of the election.

WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU MAKE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

UNITED STATES OF AMERICA ★ NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY UNITED STATES MAIL

05-RC-143199
NLRB 4410-982-2822
05-RC-143199

VOTING UNIT For Certain Employees of Guardsmark, LLC

EMPLOYEES ELIGIBLE TO VOTE: All full-time and regular part-time security officers employed by the Baltimore Regional Office in Washington, DC, who were employed by the Employer during the payroll period ending December 27, 2014.

EMPLOYEES NOT ELIGIBLE TO VOTE: Office clerks, professional employees, managerial employees, and supervisors as defined in the Act.

DATE, TIME, AND PLACE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees on Wednesday, February 4, 2015, at 3:00 p.m. on Wednesday, January 28, 2015, and will be returned to the National Labor Relations Board, Region Five, Bank of America Center, Tower II, 100 South Charles Street, Suite 1000, Baltimore, MD 21201, by mail in the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, February 4, 2015, should communicate immediately with the National Labor Relations Board by calling the Baltimore Regional Office at (410) 982-2822.

Ballots will be commingled and counted at the Baltimore Regional Office on Wednesday, February 11, 2015, at 3:30 p.m. Ballots received and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots.

UNITED STATES OF AMERICA
National Labor Relations Board
05-RC-143199

OFFICIAL SECRET BALLOT
For
Guardsmark, LLC

Do you wish to be represented for purposes of collective bargaining by
INTERNATIONAL UNION OF SECURITIES, FIRE AND FIRE
PROFESSIONAL AND ALLIED INDUSTRIES (U.S.F.A.)?

YES ☐ NO ☐

MARK AN "X" IN THE SQUARE OF YOUR CHOICE.

DO NOT SIGN THIS BALLOT. See enclosed instructions.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

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UNITED STATES OF AMERICA ★ NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY UNITED STATES MAIL

RIGHTS OF EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election. If agents of either Unions or Employers interfere with your right to a free, fair, and honest election, the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interferes with the rights of employees and may result in the setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time after ballots are scheduled to be dispatched by the regional office
- Intimidation by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes.

The National Labor Relations Board protects your right to a free choice

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law. The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election.

NATIONAL LABOR RELATIONS BOARD
an agency of the
UNITED STATES GOVERNMENT

The National Labor Relations Board is an independent federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine which employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to a representative with the Board's Regional Office. You may also obtain information from the Board's website: www.nlr.gov.

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